

What is the nature and extent of claimant's injuries and disability? Claimant alleges entitlement to a permanent partial whole body work disability under K.S.A. 44-510e for injuries suffered to her neck, low back, hip and right leg. The SALJ found claimant's injuries to her neck, low back and hip were temporary and had resolved, thus limiting claimant to only temporary total disability compensation and medical treatment, but no

permanent disability under K.S.A. 44-510e. Claimant's award was limited to a 5 percent permanent partial disability to her right lower extremity under K.S.A. 44-510d.

FINDINGS OF FACT

Claimant worked as a housekeeper at respondent's apartment complex, Suntime Apartments. On June 10, 2004, claimant was injured in an automobile accident while she and her supervisor, Lucy Hernandez, were on an errand on behalf of respondent. This was during claimant's normal work hours. They were in a vehicle being driven by Ms. Hernandez. Claimant was a passenger in the vehicle. Ms. Hernandez is claimant's immediate supervisor.

Claimant testified that she injured her right knee, lower back and neck in the accident. After the accident, claimant could not move her right leg, neck and head. The low back pain and the neck pain started immediately after the accident.

Claimant was taken by Johnson County Med-Act to the University of Kansas Medical Center (KUMC) emergency room. The Johnson County Med-Act records indicate claimant had complaints of right knee, neck and left forehead pain.¹ At the emergency room, claimant had complaints of right knee pain, neck pain and back pain.² She was provided pain medication and x-rays were performed, and she was released the same day. On June 29, 2004, claimant went to KUMC Department of Family Medicine for follow-up treatment with Dr. Milligan. The note of June 29, 2004, from KUMC does not mention any low back complaints.³ At that time, Dr. Milligan took her off work⁴ and provided pain medication. The June 29, 2004 note, which is contained in Claimant's Exhibit 2 to the Preliminary Hearing transcript, states that claimant may return to work with no restrictions on July 13, 2004, but needs to be "seen in clinic prior to her return to work."

Following her treatment at KUMC, claimant saw James Zafer, D.C., a chiropractor. The first time she saw Dr. Zafer, on July 23, 2004, he evaluated claimant and made adjustments to claimant's neck and back. Claimant followed up with Dr. Zafer for about two months, and he continued to provide treatment for her back and neck pain.

¹ P.H. Trans., Cl. Ex. 1 at 2.

² *Id.*, Cl. Ex. 2.

³ *Id.*, Cl. Ex. 2.

⁴ See Murati Depo., Ex. 2 at 1.

An MRI of claimant's right knee was obtained. It is unclear when claimant's MRI was obtained. It was either on August 16, 2004, or September 2, 2004,⁵ or there were two MRIs obtained, with the first being on August 16, 2004, and the second on September 2, 2004. It is also unclear as to whether the MRI of the knee was suggested by Dr. Zafer⁶ or by Dr. Humphrey⁷, or whether there were two MRIs with one being ordered by Dr. Zafer and the other by Dr. Humphrey.

On August 26, 2004, claimant was evaluated by orthopedic surgeon Mark S. Humphrey, M.D. Dr. Humphrey treated claimant for her right knee. He diagnosed internal derangement right knee and possible occult meniscus tear. Dr. Humphrey eventually recommended surgery.

Dr. Humphrey performed surgery on claimant on October 26, 2004, involving a right knee arthroscopy with lateral release. Claimant continued to follow up with Dr. Humphrey. On March 23, 2005, Dr. Humphrey felt that claimant was at maximum medical improvement (MMI) and felt that she could return to work with no restrictions. Dr. Humphrey released claimant without restrictions on March 23, 2005. On page 31 of the deposition of Pedro A. Murati, M.D., it states that Dr. Humphrey gave claimant a 6 percent impairment to the knee. But, this record contains no rating report from Dr. Humphrey.

Dr. Murati, a board certified physical medicine and rehabilitation specialist, saw claimant at claimant's attorney's request for an independent medical evaluation on February 8, 2006. According to claimant's testimony, she was having problems with her right knee only at the time of this February 8 examination,⁸ and the problems in her neck and back had pretty much resolved.⁹ On the medical questionnaire that was filled out in Dr. Murati's office, it indicates that the location of the pain was in her leg, knee and foot.¹⁰ However, on the pain drawing, which is on the back of questionnaire, claimant put a line all the way from the foot to the buttocks, indicating she had an ache.¹¹ On the form entitled

⁵ See Murati Depo. at 5 and 6 respectively.

⁶ See Murati Depo. at 19.

⁷ See Murati Depo., Ex. 2 at 1.

⁸ R.H. Trans. at 9 and 16.

⁹ Id. at 17.

¹⁰ Id., Resp. Ex. A.

¹¹ Murati Depo. at 44; Ex. 4.

Auto Accident Information,¹² claimant indicated that the only problems she had immediately after the accident were in the right leg, neck and head.¹³ However, claimant testified that this form was filled out by an interpreter. When Dr. Murati took a history from claimant, she told Dr. Murati that the low back pain and neck pain started right after the accident.

In a letter from claimant's attorney, Dr. Murati was asked to evaluate claimant's back, neck and knee.¹⁴ However, at the time of the February 8, 2006 visit, claimant's chief complaints were right knee pain and low back pain. There were no complaints of neck pain. Dr. Murati diagnosed claimant with right trochanteric bursitis; lumbosacral sprain; right patellofemoral syndrome; and S/P lateral retinacular release. He opined that claimant's current diagnoses are within a reasonable probability a direct result from the work-related motor vehicle accident of June 10, 2004. Dr. Murati opined that claimant has a very clear-cut knee injury which is making her limp, and that would produce problems in the low back. However, Dr. Murati confirmed that claimant never directly told him that her gait had given her a problem with her low back.

Between the period March 23, 2005, and February 8, 2006, claimant was not restricted by any doctor. Dr. Murati felt that, probably, as a result of not receiving appropriate restrictions, claimant's condition worsened. At the time of his examination of claimant, she had a trochanteric bursitis, which she did not have when Dr. Humphrey saw her. Claimant also had a patellofemoral syndrome, a low back sprain and also a limp. Dr. Murati testified that most of the time, trochanteric bursitis is caused by a bad gait.

Dr. Murati gave claimant restrictions. Those restrictions are as follows: In an 8-hour day, no squatting, crawling, driving a manual transmission, kneeling or repetitive foot controls with the right leg, and no more than 20-pound lift, carry, push or pull, and that only occasionally. Rarely climb stairs and ladders. Occasionally stand, walk, bend, crouch and stoop. Frequently sit. And lift, carry, push, pull 10 pounds. Should alternate sit, stand and walk as needed, and no lift below knuckle height.

In his report of February 8, 2006, Dr. Murati provided a rating pursuant to the fifth edition of the *AMA Guides*.¹⁵ When asked at his deposition if his rating was done pursuant

¹² *Id.*, Resp. Ex. B.

¹³ Murati Depo. at 24.

¹⁴ *Id.*, Ex. 6.

¹⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

to the fourth edition of the *AMA Guides*,¹⁶ Dr. Murati replied “Yes.”¹⁷ Dr. Murati found that claimant had a 7 percent impairment to the right lower extremity for the right trochanteric bursitis and a 5 percent impairment to the right lower extremity for the patellofemoral syndrome. These combine and convert to a 5 percent whole person impairment. For the lumbosacral sprain, claimant was given a 5 percent whole person impairment under lumbosacral DRE category II. The two whole body impairments combine for a 10 percent impairment to the body as a whole.

Dr. Murati reviewed the task list of vocational expert Dick Santner. Of the 12 tasks on this list, Dr. Murati opined that claimant is unable to perform 11, for a 92 percent task loss.

On cross-examination, Dr. Murati agreed that the first reference to any low back complaints was in the report authored by Dr. Zafer.¹⁸ However, in the KUMC emergency room record, it states that claimant had complaints of right knee pain, neck pain and back pain. But the record does not identify the area of back pain.¹⁹ Dr. Murati also confirmed that in Dr. Humphrey’s notes, he does not see any mention of any low back complaints. Dr. Murati saw claimant on only one occasion and he was the last doctor to see claimant.

Since claimant’s accident, respondent has not offered claimant her job back nor has respondent offered her accommodated employment. Claimant was not employed as of the time of her regular hearing. Her last employer was respondent. She has been looking for work, having gone to various employers to look for work, including Wal-Mart, several fast food restaurants, a laundromat, hotels and other restaurants. At one time, claimant was working selling Avon products. However, she terminated her contract with Avon because she did not have a vehicle for transportation. The only job claimant discussed with vocational expert Dick Santner was the Avon job.²⁰ Claimant has not found any other work.

Claimant testified that she walks differently now. She is no longer able to walk normally. Claimant testified that it is “a little difficult to stand for long periods of time” and

¹⁶ *AMA Guides* (4th ed.).

¹⁷ Murati Depo. at 14-15.

¹⁸ *Id.* at 17-18.

¹⁹ P.H. Trans., Cl. Ex. 2.

²⁰ Santner Depo., Ex. 2 at 2.

“walk longer stretches.”²¹ When she goes up stairs, she uses her “left leg -- left foot.” She goes up one step at a time.

During the course of claimant’s treatment with Dr. Humphrey, claimant became pregnant and carried the pregnancy to term, delivering on October 23, 2005.²²

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.²⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.²⁵

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.²⁶

²¹ R.H. Trans. at 20.

²² Award at 3.

²³ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

²⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

²⁵ K.S.A. 44-501(a).

²⁶ K.S.A. 44-510e(a).

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.²⁷

Claimant's complaints have been somewhat inconsistent throughout this litigation. The ambulance records contain complaints of right knee, neck and left forehead pain. By the time claimant had arrived at the emergency room, the complaints were to her right knee, neck and back. During her treatment with Dr. Humphrey, claimant only discussed her knee problems. It is acknowledged that Dr. Humphrey only treated claimant's knee. By the time claimant was seen and examined by Dr. Murati, claimant acknowledged, both in writing and during her regular hearing testimony, that her complaints were limited to her right lower extremity. Even though Dr. Murati found claimant's condition encompassed her right lower extremity and her low back, the SALJ and now the Board finds claimant's permanent disability is limited to her right lower extremity. The Board affirms the determination by the SALJ that claimant has suffered a 5 percent permanent partial disability to her right lower extremity, pursuant to K.S.A. 44-510d(a)(16).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge John C. Nodgaard dated May 25, 2007, should be, and is hereby, affirmed.

Although the Special Administrative Law Judge's Award approved claimant's contract of employment with her attorney, the record does not contain a filed fee

²⁷ K.S.A. 44-510e.

agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the Administrative Law Judge for approval.²⁸

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Conn Felix Sanchez, Attorney for Claimant
Heather E. Hutsell, Attorney for Respondent and its Insurance Carrier
John C. Nodgaard, Special Administrative Law Judge
Robert H. Foerschler, Administrative Law Judge

²⁸ K.S.A. 44-536(b).